In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00215-CR

CYNTHIA ANN BRIDGES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 90th District Court
Stephens County, Texas
Trial Court No. F35098, Honorable Stephen E. Bristow, Presiding

March 21, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

The issues in this appeal are rather simple. Did the State present evidence corroborating the testimony of the confidential informant identifying Cynthia Ann Bridges (appellant) as the vendor of methamphetamine? If so, did the trial court err in failing to instruct the jury about the need to corroborate a confidential informant's testimony? We

answer "no" to the first question, which answer dispenses with the need to address the second.[1]

Background

Appellant was convicted of delivering a controlled substance, that is, the aforementioned methamphetamine. The person to whom she allegedly delivered it was James Jones. Jones opted to become an informant and work with narcotics investigators after being arrested himself for possessing drugs. On the day of the purported transaction with appellant, Jones and the investigator met to discuss whom to contact in effort to acquire that day's drugs. Jones allegedly suggested appellant, placed the call, and arranged to buy 1.5 grams of methamphetamine for $140. Though the investigator "monitored" the telephone call, he recognized none of the voices. Nor did he know who appellant was or of her alleged involvement in the drug trade until informed of same by Jones.

Upon ending the call, the investigator drove to a location per the directions of Jones and parked in a church parking lot. The transaction was not to occur at the church, but rather a house with the address of 509 North Shelton. The abode could be seen from the church lot, though.

At one point or another, the investigator searched Jones to determine whether he possessed contraband, discovered none, and gave Jones $140 to complete the purchase. He also handed the informant an audio recording device to record what was about to transpire. So too did the investigator dictate a heading into the device mentioning

[1] Because this appeal was transferred from the Eleventh Court of Appeals, we decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision would be inconsistent with the precedent of the transferor court. TEX. R. APP. P. 41.3.

the date, naming the intended target (i.e., “Cindy”), and stating the geographic location of the intended purchase (i.e., “509 North Shelton”).

Jones exited the car, walked to the house, and eventually entered it while under the eye of the investigator. The investigator saw no one enter or exit the abode until Jones left it and returned to the car. The time period that lapsed approximated ten to fifteen minutes, according to the investigator. Once in the vehicle, Jones handed the investigator not only a baggie containing 1.26 grams of methamphetamine but also the recorder. The two then drove away. Before Jones was allowed to leave for the day, the investigator searched the informant once again and apparently found nothing else incriminating.

The investigator testified that he did not see the actual drug transaction. He also admitted to having no personal knowledge of the person from whom Jones actually acquired the drug. Nor could he personally identify the voices on the recording; when asked if he knew appellant’s “voice by knowledge,” he answered, “No, sir.” Instead, Jones supplied him with this missing information. Jones also supplied this missing information at trial when testifying on behalf of the State. No one else testified that they could identify the voices on the recording. No one else identified the voices captured on the audio. No one else who purportedly saw the drug transaction occur was called as a witness. No one else was called to identify anyone present within the house on 509 North Shelton on the day of the transaction. Except for Jones, no one else placed appellant within the house or identified her as the vendor of the controlled substance. Again, only the confidential informant provided that otherwise missing information.

There was the recording, though. Despite its content being rather garbled and indistinct at times, voices and conversation could be heard. They include snippets of a suspected drug transaction, the name "Cindy" being uttered apparently by Jones, a female voice jokingly describing herself as a drug dealer, and the same female voice asking for some of the substance purportedly being given to Jones. But, it was only Jones who identified the female voice and the others captured on the recording.

Finally, no arrest was conducted the day of the sale. A warrant for the arrest of appellant was issued and executed sometime thereafter. When and where that occurred went unmentioned. Similarly, unmentioned was the ownership of the house on 509 North Shelton. Whether it belonged to appellant or whether she has some type of possessory interest in it was not revealed by the record.

Authority

The legislature enacted article 38.141 of the Texas Code of Criminal Procedure in 2001. It prohibits a defendant from being convicted of an offense under the Texas Controlled Substances Act "on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed." TEX. CODE CRIM. PROC. ANN. art. 38.141(a) (West 2005). It also states that "[c]orroboration is not sufficient . . . if [it] . . . only shows the commission of the offense." *Id.* art. 38.141(b). Whether the requirements of this statute are satisfied in any particular prosecution is analyzed under the same microscope used when generally reviewing convictions based on accomplice witness testimony. *See Cook v. State*, 460 S.W.3d 703, 708 (Tex. App.—

Eastland 2015, no pet.); *Taylor v. State*, 328 S.W.3d 574, 577–78 (Tex. App.—Eastland 2010, pet. ref'd). That is, we exclude the testimony of the covert party or informant from consideration and examine the remaining evidence to decide if it tends to connect the defendant to the crime. *Taylor*, 328 S.W.3d at 578. The threshold is not high. *Cook*, 460 S.W.3d at 708. For instance, the remaining evidence need not prove the defendant's guilt beyond reasonable doubt or directly link him to the offense. *Id.* at 709. On the other hand, it must show more than mere presence at or near the scene. *Id.* And, in viewing that evidence, we do so in a light most favorable to the verdict. *Id.*

Appellant initially contends that the State failed to comply with article 38.141(a). She argues that the evidence established that Jones was a person who acted covertly on behalf of a law enforcement agency. Thus, article 38.141(a) applied. So, before she could be convicted of delivering the controlled substance, the State had to offer evidence (aside from that uttered by Jones) tending to connect her to the drug transaction. Yet, it did not, in her view. And, to support her position, she directed us to the *Taylor* opinion cited above.

Taylor was rendered by the same appellate court from which this appeal was transferred. Like the circumstances here, it involved an informant who agreed to work with law enforcement officials after being arrested for a drug offense. *See Taylor*, 328 S.W.3d at 575. Thereafter, the informant (Pritchett) met with two investigators prior to attempting a drug purchase on their behalf. *See id.* The latter searched Pritchett, fitted him with an electronic audio recorder and transmitter to memorialize what was about to occur, and handed him money with which to acquire the contraband. *See id.* One investigator drove Pritchett to the target house, allowed him to exit a block from it, saw

two people in the yard, recognized neither person, and failed to see Pritchett enter the abode. *Id.* at 575–76. The other investigator parked elsewhere away from the house, did not see the informant enter the abode, and simply monitored the wire transmitter. *See id.* at 576. When the transaction was complete, the investigator who drove Pritchett to the house met the informant and retrieved from him a zip lock bag containing a white powder later identified as cocaine. *See id.*

Like the situation here, the recorder captured the transaction, but parts of the audio were quite indiscernible. Nonetheless, five different voices could be heard, and other than their own and that of Pritchett, the investigators could identify none. Yet, they could hear the name "Chris" being mentioned several times by Pritchett and others present, and it just so happened that the defendant's first name was Christopher. *Id.* at 577. So too did they hear Pritchett say: (1) "You got some work, Dog?"; (2) "I really appreciate it, Chris"; and (3) "Thanks Chris." *Id.* at 577–78. The word "work" alluded to "cocaine," according to one investigator. *Id.* at 577. Multiple references to "$200" could also be heard on the recording. *Id.*

Of course, Pritchett testified at trial and described how he gave appellant the $200 in exchange for the baggie of cocaine. *See id.* at 576. He also identified the voices heard on the recording. They consisted of his own, those of the investigators, that of someone named Crystal Ann, and that of the accused. *Id.* The foregoing resulted in Taylor's conviction. He appealed and raised the same complaint urged by our appellant. *See id.* at 575.

Upon excluding the testimony of the informant Pritchett, the *Taylor* panel found the remaining evidence insufficient to connect Christopher Taylor to the offense. *Id.* at 579.

It observed that "[w]ithout Pritchett's testimony, there [was] no evidence that appellant was the 'Chris' at 801 Haskell Street that day. Without Pritchett's testimony, we would not know that he went to 801 Haskell Street or how appellant was connected to that house." *Id.* Before arriving at its conclusion, the panel also compared the facts before it to those in *Young v. State*, 95 S.W.3d 448 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Like in *Taylor* and at bar, narcotics officers in *Young* used a confidential informant to conduct a drug transaction, searched the informant beforehand, and gave him both money to acquire the drugs and a recorder to capture the transaction. *Id.* at 449–50. Though they did not see the informant enter the house, the officers did retrieve the recorder and drugs from the informant after he returned. *Id.* at 450. So too did they acquire a picture of the house. Yet, only the informant linked the house to the drug transaction. *Id.* at 451–52. The same was also true of the voice on the recorder; only the informant identified it as that of the appellant. *Id.* at 450. As noted by the *Young* panel before concluding that the evidence was insufficient to corroborate the informant's testimony: (1) no officer "could verify that [the informant] went to ***appellant's*** house on the day" of the transaction; (2) no witness other than the informant testified that the informant "entered ***appellant's*** house" or "that a cocaine transaction took place there"; (3) "[a]ppellant did not testify . . . and aside from [the informant], no one identified appellant's voice on the tape recording"; (4) without the informant's testimony "we have only unidentified voices on the audio tape recording"; (5) "[t]he fact that the jury was able to listen to an audio recording of a possible cocaine transaction [was] insufficient to connect appellant with the . . . offense because corroborating evidence is not sufficient if

it merely 'shows the commission of the offense'"; and (6) no officer saw where the informant went or saw the transaction occur. *Id*. at 451–52 (emphasis added).

Incidentally, the *Young* opinion was found influential not only in *Taylor* but also by the majority in *King v. State,* 334 S.W.3d 818 (Tex. App.—Beaumont 2011, pet. ref'd). That case dealt with the use of a wired informant to complete a drug buy as well. On the recording, the informant could be heard asking, "Who is you?" and "What you got?" while the other party to the conversation answered, "Blue" and "What you need?" *Id.* at 822. An officer later conducted a computer search and discovered that King used the alias "Blue." *Id.* at 821. So too did the officer show pictures of King to the informant from which the informant identified King as the person who sold him the drug. *Id.* Yet, that was not enough to satisfy article 38.141(a), according to the reviewing court. *See id.* at 824. The latter observed that it may have been that the officer ultimately "determined . . . King was the seller, but he did not explain how he made this determination." *Id.* Furthermore, "[w]ithout [the informant's] testimony, there [was] no evidence that King was the 'Blue' that sold [the informant] the cocaine." *Id.* Nor did the record indicate that the officers personally knew King. *Id.* It also was noted that (1) the officers did not see "King on the day in question or witness[] the transaction"; (2) the officers could only identify the informant's voice on the audio recording; and (3) "[e]ven had [an officer] specifically testified that Scott [the informant] identified a photograph of King as the seller," that was "insufficient corroboration as it establishe[d] nothing more than the fact that Scott said King was the seller." *Id.* at 823–24.

Taylor, *Young*, and *King* are most instructive here. Our circumstances rather mirror those previously addressed by the Eastland, Houston, and Beaumont Courts of

Appeals. We have a recording of what reasonably may be interpreted as a drug transaction, but only the informant Jones was capable of and actually identified the voices of those engaged in the sale. Only Jones indicated that "Cindy" was the appellant; as in *Taylor* and *King*, no one and nothing else corroborated the informant's identification of "Cindy" as Cynthia—the person being tried. Nothing of record suggests that the investigator with Jones even knew of appellant and her purported drug dealing before meeting with the informant shortly before the transaction occurred. Indeed, the one who monitored Jones's phone call arranging the sale admitted to knowing nothing of her beforehand and denied being able to identify the voices heard on the other side of the telephone.

Nor did any of the officers witness the actual transaction or see appellant at or within the house of 509 North Shelton. And, while it may be that one investigator saw Jones enter the home, no one presented evidence revealing the identity of the homeowner or tenant; that is, no one presented evidence suggesting that Cynthia Ann Bridges (appellant at bar) owned, resided in, visited, or had any connection with the abode on the day in question.[2] Instead, Jones alone connected appellant to the house at the time of the sale.

[2] The State suggests that appellant conceded the matter by referring to the house as "Bridge's house [sic]" in her appellant's brief. As we generally know, comments by an attorney in an appellate brief are not evidence. *See Vanderbilt v. State*, 629 S.W.2d 709, 717 (Tex. Crim. App. 1981) ("Assertions in an appellate brief that are unsupported by the record will not be accepted as fact."). Furthermore, appellant's counsel clarified that he never intended to concede that matter by using the phrase. Instead, he merely repeated references utilized by the informant which "does not, without more, indicate Bridges intends to adopt his testimony as truthful, accurate or reliable." The aforementioned authority and clarification leads us to conclude that appellant did not admit the house was owned or occupied by appellant merely because he alluded to it as "Bridge's house." Nevertheless, we caution litigants and their counsel to use care in selecting the words they intend to incorporate into their writing and argument.

Admittedly, the investigator prefaced the recording with the name "Cindy" and attributed the house at 509 North Shelton as hers. So too did he eventually show Jones a picture of appellant which resulted in Jones identifying the visage captured therein as the person who sold the drugs. Yet, it is clear that the investigator acquired the name, the identity of the house as appellant's, and the picture from information Jones told him, not from any independent source. To paraphrase *King*, such is "insufficient corroboration as it establishe[d] nothing more than the fact that [Jones] said [appellant] was the seller." *See King*, 334 S.W.3d at 823. In other words, Jones alone identified the house and appellant; the investigator merely utilized what the informant told him in both prefacing the recording and selecting the picture.

We further note that appellant did not testify. So, she did not "concede" that she was the person whose voice was captured on the recording, unlike the accused in *Bussey v. State*, No. 14-10-00685-CR, 2012 Tex. App. LEXIS 1505, at *16 (Tex. App.—Houston [14th Dist.] Feb. 28, 2012, pet. ref'd) (mem. op., not designated for publication) (substitute op.). That pivotal distinction is more than enough to dissuade us from accepting the State's invitation to follow *Bussey*.

As for *Malone v. State*, 253 S.W.3d (Tex. Crim. App. 2008), and the State's analogy to it, the investigator saw Malone outside the residence, thereby enabling him to independently identify the accused. *See id.* at 259. That investigator also saw the confidential informants (1) walking to the abode while talking to each other and having their voices recorded, (2) encounter the suspect Malone outside the house, and (3) then enter the abode with Malone's permission. *Id.* Being able to hear the voices of the confidential informants as they walked towards Malone gave the jurors the means to

distinguish them from the voice of Malone when the three individuals eventually met. *See id.* We have no independent identification of appellant by the investigator here. We have no evidence of anyone seeing appellant outside the house or interacting with Jones before he entered the house. We have no voice of appellant captured on the recording before entering the house. So, unlike the jurors in *Malone*, those here had no basis to distinguish between the voice of Jones and that of the accused.

Nor is our own precedent apposite. The precedent in question is *Walker v. State*, No. 07-12-00416-CR, 2014 Tex. App. LEXIS 9086 (Tex. App.—Amarillo Aug. 15, 2014, pet. ref'd.) (mem. op., not designated for publication), cited to us by the State. There, an officer testified to seeing the informant and Walker leave the house together, stand by the informant's vehicle, and converse momentarily after the transaction. *Id.* at *3–4. That did not happen here. No one other than the informant testified to seeing or hearing appellant outside or in the house on the day of the sale.

In short, it is clear that Jones was the type of covert agent within the scope of article 38.141(a). No one questions that. Thus, we must exclude his testimony when considering the sufficiency of the evidence corroborating appellant's purported guilt. Upon doing so, we find enough to indicate that a crime occurred. Nonetheless, the record contains nothing else that places appellant within the house at 509 North Shelton or identifies her as someone who delivered methamphetamine to Jones. Simply put, the remaining evidence does not tend to connect her to the offense, despite being viewed in a light most favorable to the verdict. This obligates us to abide by the analogous circumstances and outcomes in *Taylor*, *King*, and *Young* and conclude that insufficient corroborating evidence appears of record to support appellant's conviction.

We sustain appellant's first issue, reverse the judgment of the trial court, and enter judgment acquitting appellant. *See Taylor*, 328 S.W.3d at 579 (wherein the reviewing court entered a judgment of acquittal).

Brian Quinn
Chief Justice

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